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No. 134

In the Supreme Court of the United States

OCTOBER TERM, 1955

CLARK SQUIRE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON, PETITIONER

v.

HORTON CAPOEMAN AND EMMA CAPOEMAN, HIS WIFE

SUPPLEMENTAL MEMORANDUM FOR THE PETITIONER

SIMON E. SOBELOFF,
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v.

HORTON CAPOEMAN AND EMMA CAPOEMAN, HIS WIFE

SUPPLEMENTAL MEMORANDUM FOR THE PETITIONER

In the course of oral argument in this case on June 19, 1956, counsel for petitioner stated that from the enactment of the federal income tax law down to the present date, the Commissioner of Internal Revenue, with substantial consistency and except for a period following the issuance of certain opinions of the Attorney General in 1924–1925, has maintained the position that restricted income of Indians derived from restricted, allotted land (including gain realized upon the sale thereof[1]) is subject to the require-

[1] See, *e. g.*, Appendix, Enclosure 1, para. 7, pp. 14–15 and 2d para. p. 19, *infra*; *Dick* v. *Commisisoner*, 76 F. 2d 265 (C. A. 10), certiorari denied, 296 U. S. 588.

373490—56——1

ments of the federal income tax laws, in the absence of a specific statutory exemption from tax.

In answer to a question whether the administrative materials to which counsel referred had been dealt with in the Government's brief, counsel invited the Court's attention to the references cited at page 16, footnote 6, of the brief. The following more complete statement of the administrative history is submitted in the belief that it may prove helpful to the Court.

From the enactment of the federal income tax law in 1913 until 1924, the Commissioner of Internal Revenue took the position that Indians were taxable on income from restricted, allotted lands, except to the extent that such income was derived from land which Congress had explicitly declared shall not be subject to taxation.[2]

In 1924 and 1925, the Attorney General ruled broadly, in a series of opinions, that income from restricted lands should be considered exempt from the federal income tax on the ground that taxation of such income was inconsistent with the status of the Indians as wards of the Nation.[3]

[2] See Appendix, entries for 1914–1923, pp. 7–8, *infra*.

[3] See e. g., 34 Op. A. G. 459 (1925) (Quapaw Indians held exempt from tax on income from restricted, allotted lands (not subject to specific tax exemption)). See further 34 Op. A. G. 275 (1924) (liability of members of Five Civilized Tribes for taxes on income from homestead and other restricted, allotted land); 35 Op. A. G. 1 (1925) (Kansas Indians held non-taxable on income from allotted, restricted lands, following ruling as to Quapaw Indians); 35 Op. A. G. 107 (1926) (income of Hopi Indians from graz-

The Commissioner of Internal Revenue never accepted the broad rationale of these opinions.[4] Only two of the opinions were published as Treasury Decisions,[5] and these were apparently regarded as controlling only as to the particular tribes involved and only as to the particular types of income with which they were concerned.[6]

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ing cattle and sheep on unallotted tribal lands, and income from operation of trading post held exempt from tax) (cf. S. M. 4527, IV–2 Cum. Bull. 29 (1925), which had held such income taxable).

[4] For a discussion of the Treasury position following the issuance of the above-cited opinions of the Attorney General, see Brief for the Respondent, *Superintendent* v. *Commissioner*, No. 817, O. T. 1934, pp. 22–32. See further the argument there made to the effect that even the express exemptions from tax found in some statutes have reference only to taxation by the states, and not to taxation by the federal government, *Id.* at pp. 12–16, 24–26.

[5] 34 Op. A. G. 275 was published as T. D. 3570, III–1 Cum. Bull. 85; 34 Op. A. G. 439 was published as T. D. 3754, IV–2 Cum. Bull. 37.

[6] For example, the Commissioner continued to assert that the restricted income of Osage Indians in the form of oil and gas royalties from restricted mineral interests was taxable. *E. g.*, *Appeal of Leah Brant*, 5 B. T. A. 134 (1926); *Mary Blackbird*, 14 B. T. A. 1247 (1929), reversed, 38 F. 2d 976 (C. A. 10).

[7] For example, the Commissioner asserted that income from the reinvestment of royalty income received by a Creek Indian (member of one of the Five Civilized Tribes) from allotted, restricted, tax-exempt homestead lands was taxable. *Snell* v. *Commissioner*, 10 B. T. A. 1081 (1928). See further G. C. M. 9621, X–2 Cum. Bull. 111 (1931). Following this Court's opinion in *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 575, the Commissioner asserted that restricted income from restricted, allotted land was taxable where the Indian owner was a purchaser thereof and not the original allottee

Meanwhile the Commissioner of Internal Revenue, with gratifying success, looked to the courts to vindicate his position. See, e. g., *Choteau* v. *Burnet*, 283 U. S. 691; *Superintendent* v. *Commissioner*, 295 U. S. 418. Following this Court's decision in the latter case, the Commissioner in 1936 reasserted his position that income of all Indians from restricted, allotted lands was taxable unless expressly exempted from tax, a position which he has since consistently maintained.[8]

For the convenience of the Court, the principal rulings of the Commissioner dealing with the taxability of restricted income derived from restricted Indian lands are listed chronologically in the Appendix, *infra*, pp. 7–11.

At the close of the argument, one member of the Court invited counsel's attention to the statement in the "Handbook of Indian Law," prepared by the Solicitor of the Department of Interior in 1940, that (p. 265): "It is clear that the exemption accorded tribal and restricted Indian lands extends to the income derived directly therefrom." If this is read as a statement that all restricted income derived directly from restricted Indian lands is non-taxable (as its context suggests), it would appear that the author not only ignored the authoritative rulings of the Commis-

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or an heir of the original allottee. G. C. M. 6020, VIII–1 Cum. Bull. 63 (1929). Compare G. C. M. 2056, VI–2 Cum. Bull. 65 (1927).

[8] See Appendix, entries for 1936 to 1954, pp. 9–11, *infra*.

sioner of Internal Revenue[9] and the current instructions of the Department of the Interior to Indian Superintendents in the field,[10] but cited in support of his position only materials which then had no current vitality, including an opinion of the Attorney General issued in 1925 that had been explicitly overruled by the Attorney General in 1937 as inconsistent with intervening decisions of this Court;[11] and a court of appeals' decision which has been explicitly rejected by this Court as unsound.[12] In the light of these considerations, the above-quoted expression of opinion in the "Handbook" must either be construed as having reference only to income from lands expressly declared exempt from tax by statute, in which event it has no bearing on the issue presented by this case, or it must be rejected as inaccurate and entitled to no weight as evidence of contemporaneous administrative practice.[13]

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[9] See Appendix, entries for 1936 to 1937, pp. 9–10, *infra*.

[10] Dept. of Interior, Office of Indian Affairs, Misc. Cir. 3240, March 11, 1938 (Appendix, Enc. 2, *infra*, p. 23).

[11] T. D. 3754 (34 Op. A. G. 439 (1925)), overruled by 39 Op. A. G. 107 (1937), 1937–2 Cum. Bull. 61.

[12] *Blackbird* v. *Commissioner*, 38 F. 2d 976 (C. A. 10). In *Superintendent* v. *Commissioner*, 295 U. S. 418, 419–420, the Court referred to the rationale of the *Blackbird* case and said that the court of appeals had "properly declined to follow [this] pronouncement".

[13] The "Handbook" did not purport to be an official Departmental document. As the Secretary of Interior said in his foreword to the book: "This Handbook of Federal Indian Law should give to Indians useful weapons in the continual struggle that every minority must wage to maintain its lib-

With respect to all other income involved, as set forth in your letter of the 12th instant, it appears that the relation of the Interior Department to the Osage Indians is that of a fiduciary and when a distributable interest of any Indian in such funds from March 1 to December 31, 1913, amounts to $2,500, a fiduciary return of income should be made on form 1041. A return being made, the respective interests of all beneficiaries should be shown. It appearing that there is warrant of law for paying income of minor children to the parents of such children, when that fact obtains, the income of the child so paid to the parent should be accounted for as income of the parent.

As to profits from the sale of land: Take the appraised value of the land at the time of allotment, and if appraisement was not had, then what shall be determined as being the fair value of the land at that time. This value deducted from the sale price within the taxable period will be the measure of profit, as the land has been exempt from taxation. Prorate this profit in proportion of the whole time to the taxable time, taking 1913 as one year.

Your attention is invited to letter of this Department of February 6, 1914, in matter of taxability of royalties accruing to individual members of the Five Civilized Tribes of Indians in Oklahoma. The statement of law and regulations as contained in said letter applies in the instances here stated wherein it is the duty of the Interior Department to act for the Osage Indians.

Decisions, United States vs. Rickert (188 U. S., 432), and United States vs. Thurston County (143 Federal Report, 287), have been considered,

We conclude that the Commissioner of Internal Revenue has, since the enactment of the federal income tax laws in 1913 (except to the extent above noted during the period 1925–1936), maintained the position that income of Indians such as that involved in this case is subject to the federal income tax.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.
H. BRIAN HOLLAND,
Assistant Attorney General.
CHARLES F. BARBER,
Assistant to the Solicitor General.
HILBERT P. ZARKY,
CAROLYN R. JUST,
Attorneys.

JANUARY 1956.

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erties * * *. Whatever legal force [this work] will have must be derived from the original authorities which have been assiduously gathered and patiently analyzed" (*id.*, at pp. v–vi).

and are held to have no bearing upon the taxability of income here involved.

It is proper to add that in matter of distributive interests of these individual Indians, only such portion thereof as shall be applicable to the period March 1 to December 31, 1913, is to be considered for income tax purposes in the returns of income now due.

Respectfully,

C. S. HAMLIN,
Acting Secretary.

TREASURY DEPARTMENT
WASHINGTON

FEBRUARY 6, 1914.

The Honorable
The Secretary of the Interior.

SIR: This department is in receipt of your letter of the 4th instant, calling attention to a letter written by your department under date of December 15, requesting an opinion of this office as to the following propositions:

> 1. Whether royalties arising from oil, gas and other mineral leases made by or on behalf of individual members of the Five Civilized Tribes of Indians in Oklahoma in or upon restricted lands held in severalty by said individuals; are subject to the provisions of the income tax law?
>
> 2. Whether the Superintendent of the Union Agency, or the lessee, is the "source" for withholding purposes; and if the Union Agency is the "source," should the Superintendent of said Agency ascertain and deduct the amount of depreciation of the mines, etc., not exceeding five per cent, as provided in the income tax law?

APPENDIX

ADMINISTRATIVE RULINGS RELATING TO TAXATION OF INCOME DERIVED BY INDIANS FROM RESTRICTED ALLOTTED LANDS

A. *First Period* (1913–1924)

1914 Information regarding applicability of federal income tax laws to Indians promulgated to Superintendents in charge of Indians. Dept. of Interior, Office of Indian Affairs, Circular No. 835, March 7, 1914 (Encl. 1, *infra*, pp. 11–22).

1921 Penalties will not be assessed for delinquencies in income tax returns filed by the United States for restricted Indians in view of the fact that the penalty provisions of the law are not operative against the government (5 Cum. Bull. 237).

1922 Restricted income in the form of rents and royalties from mining lease on restricted allotted land of a Quapaw Indian constitutes taxable income (I-1 Cum. Bull. 64).

Income tax returns should be filed and the tax due thereon should be paid by the Office of Indian Affairs for Indians whose property is under its control (I. T. 1366, I-1 Cum. Bull. 242).

1923 Income of any sort derived by Quapaw Indians from their restricted allotted lands constitutes taxable income (II–2 Cum. Bull. 55).

Income of Osage Indians from restricted "surplus allotments" is subject to tax; income from homestead allotments is exempt from taxation in view of 41 Stat. 1249, 1250, which

provides: "the homestead allotments of all the members of the Osage Tribe should not be subject to taxation, if held by the original allottee, prior to April 8, 1931" (II–2 Cum. Bull. 62).

B. *Period influenced by Attorney General's Opinions* (1924–1935)

1924 Attorney General ruled (34 Op. A. G. 275) that specific exemptions from tax granted to certain of the Five Civilized Tribes on homestead allotments constitute vested property rights. Income received from other restricted lands is tax exempt until the restrictions on the land are removed by act of Congress or by action of the Secretary of the Interior (T. D. 3570, III–1 Cum. Bull. 85).

1925 Attorney General ruled (34 Op. A. G. 439) that income of Quapaw Indians from restricted, allotted lands is not subject to the federal income tax laws, taxation of this income being inconsistent with the status of the Indians as wards of the Nation (T. D. 3754, IV–2 Cum. Bull. 37).

1926 Income of Ponca Indians directly derived from land allotted under General Allotment Act of 1887 held non-taxable following the above-cited Attorney General's opinion (S. M. 5632, V–1 Cum. Bull. 193).

1928 Income from allotted lands held by Creek Indians, as to which restrictions on alienation had been removed, is subject to federal income taxation, the Act of April 26, 1906 (34 Stat. 137, 144), providing that: "All lands upon which restrictions [on alienation] are removed shall be subject to taxation." Income from

40-acre homestead allotment not subject to taxation for years prior to 1921, in view of the Act of June 30, 1902 (32 Stat. 500, 503), which provides that such homestead allotments "shall be and remain nontaxable * * * for twenty-one years." (G. C. M. 2008, VII–1 Cum. Bull. 209.)

1929 Restricted income from restricted land purchased by a noncompetent Otoe Indian with the consent of the Secretary of the Interior is subject to federal income taxation (scope of Attorney General's opinions limited in view of decision in *Shaw v. Gibson-Zahniser Oil Corp.*, 276 U. S. 575). (G. C. M. 6020, VIII–1 Cum. Bull. 63, reversing G. C. M. 2715, VII–1 Cum. Bull. 56.)

1930 Income of minor Creek Indians under guardianship subject to the jurisdiction of the probate courts of Oklahoma is subject to federal income taxes, except as to income from nontaxable homestead allotments as to which the statutory 21-year period has not expired (G. C. M. 8066 IX–2 Cum. Bull. 316).

1931 Restricted income of Choctaw Indians derived from reinvestment by the Interior Department of income from restricted, allotted lands held taxable (G. C. M. 9621, X–2 Cum. Bull. 111).

C. *Current Period* (1936–date)

1936 Procedures with respect to taxability of income of certain Indians from allotted lands reviewed in the light of *Superintendent v. Commissioner*, 295 U. S. 418:

No change in procedures is required with respect to taxation of income from allotted

lands of Five Civilized Tribes. Such income is and has been taxed or considered "exempt from taxation" (see, e. g., 34 Stat. 137, 144) according to the statutory pattern (G. C. M. 16020, XV–1 Cum. Bull. 78).

Hereafter the income of restricted Osage Indians from mineral leases on tribal lands should be taxed inasmuch as the relevant statutes do not confer any tax exemption, and in view of the fact that in *Superintendent* v. *Commissioner*, *supra*, "The Court specifically stated that the decision in *Blackbird* v. *Commissioner* (38 Fed. 2d, 976), which is to the contrary, does not harmonize with its opinion in *Choteau* v. *Burnet* (283 U. S., 691) * * *" (G. C. M. 16100, XV–1 Cum. Bull. 80).[14]

1937 Attorney General ruled (39 Op. A. G. 107) that decision of Supreme Court in *Superintendent* v. *Commissioner*, *supra*, must prevail over the contrary conclusion reached in 34 Op. A. G. 439 (1925) (*supra*) regarding the taxability of income from restricted lands of the Quapaw Indians (1937–2 Cum. Bull. 61).

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[14] This ruling was revoked in 1937, the Bureau considering that it was estopped by the judgment in *Blackbird* v. *Commissioner*, 38 F. 2d 976 (C. A. 10) (a class suit on behalf of the Osage tribe), from asserting income tax liability with respect to royalty income from Osage lands. G. C. M. 18242, 1937–1 Cum. Bull. 57. This latter ruling was promptly used as a basis for criticizing the application of the doctrine of estoppel by judgment to income tax cases (see 51 Harv. L. Rev. 559–560 (1938)), and after this Court clarified the proper application of the doctrine, in *Commissioner* v. *Sunnen*, 333 U. S. 591, the ruling was revoked (G. C. M. 26399, 1950–2 Cum. Bull. 8).

1938 Indian Superintendents informed by Commissioner of Indian Affairs that "Unless * * * there is specific exemption either by treaty or act of Congress, the Indians should file returns as well as other citizens when their income is sufficient to bring them under the terms of the Federal Income Tax Law." Dept. of Interior, Office of Indian Affairs, Misc. Circular 3240, March 11, 1938 (Encl. 2, p. 23, *infra*).

1954 The Internal Revenue Service restated its position "that exemption from the payment of Federal income tax may not be implied, and that if exemption of Indians from the payment of such tax exists, it must derive plainly from the Federal tax statutes, or from treaties or agreements with the Indian Tribes concerned or some Act of Congress dealing with their affairs." (Rev. Rul. 54–456, 1954–2 Cum. Bull. 49).

Land–
Contracts.
R J H

Appendix
Enclosure 1

DEPARTMENT OF THE INTERIOR

OFFICE OF INDIAN AFFAIRS

WASHINGTON

Circular No. 835.

MARCH 7, 1914.

Superintendents in Charge of Indians:

Referring to the recent so-called Income Tax Law, your careful attention is directed to the following correspondence between this Department and the Treasury Department:

DEPARTMENT OF THE INTERIOR

WASHINGTON

FEBRUARY 12, 1914.

The Commissioner
of Internal Revenue:

SIR: Will you please advise this Department at as early a date as practicable whether moneys arising under the acts of Congress cited in the following paragraphs are subject to taxation under Section 2 of the Act of October 3, 1913, entitled "An Act to Reduce Tariff Duties and to Provide Revenue for the Government, and for Other Purposes," and if so, what shall be considered the source at which the tax shall be withheld?

1. Oil and gas royalties paid into the Osage Indian Agency under the Act of March 3, 1905 (33 Stat. L., 1048, 1061), and Sec. 3 of the Act of June 28, 1906 (34 Stat. L. 539, 543). The former Act extended for a period of ten years, from March 16, 1906, as to 680,000 acres, a lease given by the tribe to one Edwin B. Foster for oil and gas mining purposes, which lease was first made on March 16, 1896, under the provisions contained in the Act of February 28, 1891 (26 Stat. L. 794), as amended by the Act of August 15, 1894 (28 Stat. L. 305).

The Act of June 28, 1906, provided for the division of the lands and funds of the Osage Indians, but specifically reserved to the tribe all the minerals under the lands. These royalties when collected constitute a tribal fund, and are deposited in the Treasury as such.

2. Payments of pro rata shares of the Osage tribal fund. The first subdivision of Sec. 4 of the Act of June 28, 1906, supra, provided for the segregation of the Osage tribal fund, and the placing of the same to the credit of the individual members of the tribe on the basis of a pro rata division, the funds to remain in the Treasury, and to draw interest. The Act of April 18, 1912, (37 Stat. L. 86, 87), provided for the payment, under regulations to be prescribed by the Department, to the Osage allottees of the segregated funds. When claims for the segregated shares are allowed, the warrants are prepared by the Treasury and forwarded to the superintendent for delivery.

3. Quarterly payments to individual Osage Indians under the second subdivision of Sec. 4 of the Act of June 28, 1906, supra, which provides for the distribution of all royalties received from tribal mineral leases and from other sources. The shares of minors are, under the law, paid to the parents unless withheld by the Commissioner of Indian Affairs, which he may do if he is satisfied that the funds of any minor are being misused or squandered.

Should these funds be subject to taxation, are the shares of each individual Indian to be considered as separate and distinct incomes, or are the shares of the minors which are paid to the parents to be considered as a part of the parents' income?

4. Damages paid to individual allottees by reason of operations under tribal leases. Sec. 26 of the Regulations of July 3, 1912, a copy of which is inclosed, provides how surface damages

shall be ascertained. Only in cases where there is a controversy are the funds paid through the Agency; otherwise the agreements are direct with the allottees.

5. Rents arising under leases made by individual Osage allottees covering the surface in accordance with Sec. 7 of the Act of June 28, 1906, supra. Under the regulations of the Department now in force, these rents must pass through the hands of the Superintendent in charge of the Osage Agency. Some leases are still in effect under former regulations which permitted the rents to be paid direct to the allottees and to the parents of minors. Are the rents from the minors' allotments to be considered as the income of the minors or part of the income of the parents?

6. Rents and royalties arising under leases of tribal lands in general for agricultural, grazing and mining purposes, under the Act of February 28, 1891, as amended by the Act of August 15, 1894, supra. These funds are paid into the offices of the various Superintendents in charge of Indian reservations and deposited by him in the Treasury where they are carried under the caption, "Indian Moneys, Proceeds of Labor", and are subject to expenditure for the benefit of the several tribes to whose account the moneys are covered in, under the direction of the Secretary of the Interior as provided in the Acts of March 3, 1883 (22 Stat. L., 590), and March 3, 1887 (24 Stat. L., 463).

7. Funds arising from the sale and lease of lands allotted to Indians under the provisions of the Act of February 8, 1887 (24 Stat. L., 388),

and similar Acts. This Act provides that upon the approval of allotments by the Secretary of the Interior, "he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of 25 years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumberance whatsoever."

The law permits the leasing of these allotted lands for farming, grazing and mining purposes under regulations prescribed by the Secretary of the Interior. The various regulations prescribed by the Department require in some cases that the lands and royalties shall be paid into the hands of the Indian Superintendent having jurisdiction over the allotments and in other cases the funds are paid direct to the allottee.

Sales of allotted lands held in trust by the United States may be made under Sec. 7 of the Act of May 27, 1902 (32 Stat. L., 245, 275), the Act of March 1, 1907 (34 Stat., L., 1015, 1018), the Act of May 29, 1908 (35 Stat. L., 444), and Act of June 25, 1910 (36 Stat., L., 855), and under the regulations of the Department the proceeds are paid into the hands of the Superintendent having jurisdiction over the lands.

In connection with the question of taxation of Indian lands and proceeds thereof, your attention is respectfully directed to the case of the United States vs. Rickert (188 U. S. 432) in which it was held (syllabus) "that neither the lands allotted, nor the permanent improvements thereon, nor the personal property obtained from the United States and used by the Indians on the allotted lands, are subject to State or local taxation during the period of the trust," and to the case of the United States vs. Thurston County (143 Federal Reporter 287), in which the United States Circuit Court of Appeals, Eighth Circuit, held that "the lands and their proceeds so long as they are held or controlled by the United States and the term of the trust has not expired * * * are not subject to taxation by any State or county."

Respectfully,

(Signed) A. A. JONES,
First Assistant Secretary.

TREASURY DEPARTMENT
WASHINGTON

FEBRUARY 25, 1914.

The Honorable
The Secretary of the Interior.

SIR: This Department is in receipt of your letter of February 12, asking whether certain funds, the property of Osage Indians, are taxable, and if they are taxable, whether shares and interest therein the property of minors, paid to parents of such minors, are to be considered the income of the parents.

The individual is the taxable entity, and only income (as distinguished from principal) accruing to the individual is taxable.

It appears from your letter that the funds in question consist of (1) rents for the use of land; (2) royalties from oil, gas, and other mineral leases; (3) damages for injury to the surface of the land; (4) proceeds from sale and lease of Indian lands.

It also appears from your letter that (with the exception of damages aforesaid—and they also, in case of controversy—and certain rents paid to individual allottees) all of the aforesaid funds are subject to the receipt, custody, control, and disposition of the Interior Department.

It also appears that upon division of lands and funds of the Osage Indians the minerals under the lands were specifically reserved to the tribe, and that mineral royalties collected constitute a tribal fund and are deposited in the United States Treasury as such, to the credit of the individual members of the tribe, on the basis of a pro rata division, the funds to remain in the Treasury and draw interest; that the individual interests in these funds, together with their accumulation, may be, by statutory provision therefor, paid to the individual Indian entitled thereto, the warrant for such interest being prepared by the Treasury Department and forwarded to the Superintendent of the Indian Agency for delivery; that under the provisions of the law and Department regulations, the shares of minors in the aforesaid funds are paid to the parents of such minors, within the discretion of the Commissioner of Indian Affairs.

As to damages paid to individual allottees: Your regulations, July 3, 1912, Section 26, to which you refer, did not accompany your letter, and it does not otherwise appear what these damages are. If, as a matter of fact, they are reimbursement for depreciation solely, the question is presented whether they exceed actual depreciation. If no depreciation were claimed it might be that damages to the extent of allowable depreciation would not be considered income. Any excess of such damages over actual depreciation allowed would be income. If depreciation were claimed and allowed, the entire amount of damages would be income.

As to the rent paid direct to the allottees, and by law and regulation, the interest of minor Indian children paid to their parents: In both the case of damages and such rent, it appears that the same, as income, is legally received direct by the Indians, and that the United States Government has no enforcible interest therein and no right of custody, control, or disposition thereof. As to this particular income, so far as at present advised, this Department holds the Indian receiving it will be held responsible for any tax which may be due and payable thereon, and that when the amount of such income as shall be taxable, added to other income received, shall amount to $3,000 per year ($2,500 March 1 to December 31, 1913) a return of income will be required. In this connection also, the income belonging legally to minor children but legally paid to parents of such children, is to be accounted for as income of parents.

3. Whether the Interior Department—through its officer at Muskogee—is the "source" for the purpose of withholding income tax payable from salaries accruing to tribal attorneys and officers, and which said salaries are payable from Creek tribal funds?

1. Upon consideration of facts set out in your letter, this Office holds the royalties in question are within the classes of income which are subject to the provisions of the income tax law.

2. The "source" is "the place where the income originates." It appears from your letter that the grantors in the leases, the subject of your letter, are individual members of the Five Civilized Tribes, and the inference follows that the lessees are individuals or corporations capable of independent contract. It does not appear from your letter what is the legal relationship subsisting between the Union Agency (or its Superintendent) and the aforesaid grantors in matter of these leases. It would seem from your letter, however, that the Union Agency is the representative of the Interior Department in dealing with these Indian interests. If, as a fact, the relationship between the Interior Department and the aforesaid grantors in his behalf is that of a fiduciary, the said Union Agency, as the agent of the Interior Department, may be considered as the "source." The Interior Department assuming the duty of withholding through its Union Agency, aforesaid, acquittance may be given the lessees in accordance with income tax form 1015, and the Union Agency having in possession, with diminution, the aforesaid royalties, will then withhold and pay over to the Collector

of Internal Revenue, in accordance with income tax provisions, the amount of income tax accruing upon taxable funds in its hands. It would seem to follow that, as the administrative agency of the aforesaid Indian interests, the Superintendent of the Union Agency may be directed to ascertain and make the allowable deduction for depreciation of mines, etc.

3. If, as a fact, the Interior Department has the custody, control, and disposal of the funds from which the salaries of tribal attorneys and officers in question are paid, it will be considered the "source" and should direct its officers accordingly.

Copy of form 1015 is herewith enclosed, as exhibit, for your information.

Trusting that matters of law and regulation, the subject of inquiry, have been accurately and satisfactorily covered, I am,

Respectfully,

(Signed) C. S. HAMLIN,
Acting Secretary.

You will govern yourself in accordance herewith.

Respectfully,

E. B. MERITT,
Assistant Commissioner.

3-HFW-5

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF INDIAN AFFAIRS

WASHINGTON

Misc. /

Appendix
Enclosure 2

Circular No. 3240

Liability of Restricted Indians to Federal Income Tax.

MARCH 11, 1938.

To all Superintendents:

Numerous inquiries have been received regarding the liability of restricted Indians to Federal income tax.

The Supreme Court of the United States in the case of *Superintendent of Five Civilized Tribes* v. *Commissioner of Internal Revenue* (295 U. S. 418), held that the income of Indians is subject to the Federal income tax unless specifically exempted by treaty or act of Congress.

Unless, therefore, there is specific exemption either by treaty or act of Congress, the Indians should file returns as well as other citizens when their income is sufficient to bring them under the terms of the Federal Income Tax Law.

(SGD) JOHN COLLIER,
Commissioner.

U. S. GOVERNMENT PRINTING OFFICE, 1938